

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 18 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0353-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LORENZO SANCHEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070221

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Thomas C. Horne, Arizona Attorney General
By Kimberly H. Ortiz

Tucson
Attorneys for Respondent

Catrillo Law Firm
By Barbara Catrillo

Tucson
Attorney for Petitioner

E C K E R S T R O M, Judge.

¶1 Lorenzo Sanchez petitions this court for review of the trial court's denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will

not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 2008, Sanchez pled guilty to transportation of a dangerous drug for sale and misconduct involving weapons. The trial court sentenced him to concurrent, partially mitigated prison terms of eight years and 2.5 years, respectively. Sanchez’s trial counsel then filed a notice of appeal on March 3, 2008. We dismissed that appeal on April 7, 2008, stating the appeal was not permitted because it was “taken from the entry of a plea of guilty or no contest.” *See* Ariz. R. Crim. P. 17.1(e). Our mandate issued June 5, 2008. Approximately two years later, without first filing the notice required by Rule 32.4(a), Sanchez filed a petition for post-conviction relief asserting his trial counsel had been ineffective in failing to adequately investigate his case before advising him to plead guilty. Sanchez acknowledged the Rule 32 proceeding was untimely, *see* Ariz. R. Crim. P. 32.4(a), but argued his petition should not be dismissed because he was not at fault for the late filing due to his trial counsel’s erroneous filing of a notice of appeal. *See* Ariz. R. Crim. P. 32.1(f), 32.2(b). The trial court summarily dismissed Sanchez’s petition, concluding that his claim was both untimely and without merit.

¶3 In his petition for review, Sanchez argues the trial court erred in finding his claim untimely, asserting that his trial counsel’s decision to file a notice of appeal instead of a notice of post-conviction relief was “irrefutable and conclusive proof of his ineffective assistance” and that Sanchez therefore cannot be faulted for his failure to timely file a notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.1(f), 32.2(b). But he fails to acknowledge, much less address, the two years that elapsed from the time our

mandate issued to the filing of his petition for post-conviction relief. He argues, without citation to authority, only that he should not be “expected to understand that an appeal was not permitted” or know “that he still had the right to seek review of his case” pursuant to Rule 32 following the dismissal of his appeal. *See* Ariz. R. Crim. P. 32.2(b) (“If . . . meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice [of post-conviction relief] shall be summarily dismissed.”).

¶4 In a “notice of rights of review after conviction,” Sanchez was informed that, as a pleading defendant, he could seek relief only “by petition for post-conviction relief.” And that document correctly instructed Sanchez about the time he had to file a notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a) (Rule 32 notice must be filed within ninety days after judgment and sentence or within thirty days after appellate court issues mandate). Sanchez was provided with and signed both English and Spanish language versions of the document. Additionally, our order dismissing his appeal referred to Rule 17.1(e), which also states a pleading defendant “may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review.” Thus, Sanchez plainly had adequate notice that the proper avenue to seek relief from his conviction and sentence was by a petition for post-conviction relief, and he neither explains nor supports his assertion that he did not understand he could do so. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”).

¶5 Whether measured from the entry of judgment in his case or the issuance of our mandate in his erroneously filed appeal, Sanchez’s Rule 32 proceeding was untimely. Sanchez’s argument that the trial court erred by holding him to a higher standard than his trial counsel misses the mark. There is little question his counsel’s conduct in filing an appeal in these circumstances fell below prevailing professional norms. But that conduct simply does not excuse Sanchez’s failure to take any action for two years after our mandate issued.

¶6 Even if we agreed Sanchez should be excused from his untimely filing of the petition for post-conviction relief, he does not address the trial court’s determination that he had failed to state a colorable claim of prejudice resulting from counsel’s purportedly deficient performance, and so was not entitled to relief on the merits of his claim. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (defendant must establish both deficient performance and resulting prejudice to prevail on ineffective assistance claim; prejudice requires showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”); *see also* Ariz. R. Crim. P. 32.9(c)(1) (failure to raise issue in petition for review “shall constitute waiver of appellate review of that issue”); *State v. Aleman*, 210 Ariz. 232, ¶¶ 8-10, 109 P.3d 571, 575 (App. 2005) (failure to address alternative grounds for ruling in opening brief may result in waiver). Accordingly, Sanchez has failed to demonstrate the trial court abused its discretion in summarily dismissing his petition for post-conviction relief.

¶7 For the reasons stated, although we grant review of Sanchez’s petition, we deny relief.

/s/ *Peter J. Eckerstrom*
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ *Garye L. Vásquez*
GARYE L. VÁSQUEZ, Presiding Judge

/s/ *Virginia C. Kelly*
VIRGINIA C. KELLY, Judge